METRO TYRE SERVICE CENTRE SDN BHD

v.

WILFRED JOLLY

HIGH COURT SABAH & SARAWAK, BINTULU
ABDUL AZIZ RAHIM JC
[CIVIL APPEAL NO: 12-01-2002 (BTU)]
20 JUNE 2003

TORT: *Negligence - Duty of care - Vehicle sent for repair at defendant's workshop - Vehicle driven away by unknown person in presence of owner while parked outside defendant's workshop - Whether defendant negligent - Vehicle still under hire - Rights of hirer - Meaning of "possession"*

The plaintiff ('PW1') had sent a vehicle for repair at the defendant's workshop. The vehicle was then still under hire, the hirer being PW1 himself. Having repaired the vehicle, the defendant's agent DW1 parked the vehicle outside the premises and left the ignition key inside the vehicle. DW1 then alighted from the vehicle and gave a thumb-up sign to PW1. PW1, who was standing beside the vehicle and talking over his handphone, responded by giving the same gesture. Soon thereafter, the vehicle was driven away for good by an unknown person, thereby causing losses to PW1. PW1 alleged negligence by the defendant and sued the defendant for the loss of the vehicle. The learned Sessions Court judge ruled that the defendant was liable for the loss as possession of the car had not passed to PW1 at the time of the thumb-up gestures, and so allowed the claim. It was also the view of the trial judge that the plaintiff was the owner of the vehicle and therefore had the right to claim for its loss. The defendant appealed and the issues were: (i) whether PW1 as the hirer had the locus to claim for the vehicle's loss; and (ii) whether the defendant was negligent in the circumstances.

Held (allowing the appeal):

[1] In law possession does not necessarily mean physical possession. The learned trial judge was therefore wrong when concluding that PW1 did not have possession of the vehicle because there was no physical possession. (p 380 a)

[1a] On the evidence, it is more reasonable to infer that possession had passed to PW1 when the vehicle was driven off. When PW1 acknowledged DW1's 'thumb up' gesture with similar gesture, the

inference was that PW1 had acknowledged the return of the vehicle to him after the repair was done. Possession, therefore, had passed to PW1 when the vehicle was driven off. (pp 380 d & 381 c)

[2] DW1's act of leaving the ignition key in the vehicle at the 'on' position could not amount to negligence. PW1 was then standing beside the vehicle and PW1 had acknowledged the thumb-up signal. DW1 could therefore reasonably assume that PW1 had acknowledged the return of the vehicle when he acknowledged DW1's thumb-up sign. It was also reasonable for DW1 to leave the ignition key at the 'on' position considering that PW1 was standing next to the vehicle at the material time. (p 381 d-e)

[3] As a hirer, the respondent could not claim to be the owner of the vehicle. The learned trial judge was wrong in concluding that the respondent was the owner of the vehicle and therefore had the right to claim for its loss. (p 382 c)

Case(s) referred to:
Arab Malaysian Finance Bhd v. Samian Sabin & Anor [2003] 2 CLJ 115 HC ***(refd)***
BBMB Kewangan Bhd v. Tan Swee Heng & Anor [2002] 7 CLJ 377 HC ***(refd)***
Credit Corp (M) Bhd v. The Malaysian Industrial Finance Corp & Anor [1976] 1 MLJ 83 ***(refd)***
Dato' Yap Peng v. PP [1993] 1 MLJ 337 ***(refd)***
Low Ping Ming v. MBF Finance Bhd [2002] 2 CLJ 30 HC ***(refd)***
Mohd Samsuddin bin Ismail v. Tan Yeow Hwa & Anor [2000] 7 MLJ 24 ***(refd)***
Nambiar v. Chin Kim Fong [1963] 29 MLJ 60 ***(refd)***
Public Finance Bhd v. Ehwan Saring [1996] 1 CLJ 628 HC ***(refd)***

For the plaintiff/respondent - Edward Usa; M/s Ali Basah & Partners
For the defendant/appellant - Sim Yaw Yen; M/s Tang & Partners

Reported by Rusnah Aziz

JUDGMENT

Abdul Aziz Rahim JC:
This is an appeal by the appellant/defendant against the decision of the learned Sessions Court judge sitting at Bintulu given on 18 September 2001, allowing the respondent/plaintiff claim against the appellant for damages for the loss of the respondent vehicle bearing Registration No. QR2136 while it was under repair at the appellant premises. Brief facts of the case are as follows:

The appellant/defendant operate a service and repair shop at No. 72, Lot 2409 Medan Sepadu, Jalan Abang Galau, Bintulu. On or about 7 June 1994 the respondent/plaintiff sent his Toyota Hilux Surf bearing registration No. QR2136

to the appellant shop for repair. The vehicle was at the time of the incident still subject to the terms of hire purchase agreement between the respondent/plaintiff and the Hire Purchase Company Kewangan Utama Berhad dated 9 February 1993. The respondent/plaintiff alleged that the vehicle was stolen while at the appellant/defendant premises. The respondent's claim against the appellant was grounded on negligence. In the alternative, the respondent also claimed against the appellant for the loss of use of the vehicle (see the amended statement of claim at p. 7 of the Record of Appeal).

In its defence, the appellant denied the allegation of negligence and contended that the respondent was solely to be blamed or had contributed to the loss of the vehicle. But on closer perusal of the statement of defence at p. 8 of the Record of Appeal, the appellant's main defence was grounded on two grounds. Firstly that the respondent had no locus to sue for the loss of the vehicle, the respondent being only the hirer and not the owner and secondly that the vehicle was in the respondent's possession when it was alleged to have been driven away by person or persons unknown. In its Memorandum of Appeal, the appellant raised five grounds of appeal as follows:

1. The Learned Judge has erred in law in concluding that the plaintiff as the Hirer of vehicle at the time of loss has the right to sue the defendant for the loss of the vehicle.

2. The Learned judge has erred in law in drawing the inference that the vehicle was still in the possession of the defendant after the defendant did the thumb up signal to the plaintiff and the plaintiff responded with another thumb up signal.

3. The Learned judge has erred in law in finding that the defendant was negligent and wholly responsible for the loss of the plaintiff's vehicle in the light of the evidence adduced before the Sessions Court.

4. The Learned judge has erred in finding that the plaintiff did not contribute to the loss of the vehicle which is against the weight of evidence adduced before the Sessions Court.

5. The Learned judge has erred in law in awarding the plaintiff the value of the vehicle less the insurance pay out where in law, the plaintiff ought to be claiming for loss of use of the vehicle for a period of six (6) months from 7/6/1994 to 7/1/1995.

I will deal with grounds 2, 3 and 4 together. As to the issue of whether the vehicle was or was not in the possession of the respondent at the time it was driven away by person or persons unknown, the learned Sessions Court judge says this in his judgment:

> There is no evidence from DW1 in what way that the vehicle is in the possession of PW1. Furthermore after DW1 alighted from the vehicle and saw PW1 still talking with the hand phone and after giving a signal, he just left PW1 with the vehicle without knowing whether or not PW1 was already in physical possession of the vehicle. The Court is satisfied that the vehicle was still in the possession of DW1 when it was driven off by unknown person. As such the defendant is liable for the loss of the vehicle.

The learned Sessions Court judge came to that conclusion after he had addressed his mind to the evidence at the trial and this is what he said in his assessment of the evidence:

> There are these two versions of the incident, PW1 saying that DW1 had parked his vehicle at the rear side of premise when at the same time he (PW1) went to the office to settle the bill. He saw somebody drove off his vehicle after settling the bill. DW1 on the other hand saying that when he parked the vehicle to the side rear of the shop premise PW1 was standing next to the vehicle talking on his hand phone and he left the vehicle with PW1 after he did a thumb up signal and PW1 responded by doing a thumb up signal also. However there was no dispute that when the vehicle was driven off by unknown person(s) on 7 June 1994, it was still at DW1's premises. The main issue is whether the loss of the vehicle was caused by the negligence of DWl's agent or workmen. DW1 is a working partner of Defendant company and has control and management of the Defendant's premises, and as such he is the occupier of the Defendant's premises. Being occupier of the Defendant's premise, DW1 has duty of care towards PW1 who was coming lawfully to the premises. Counsel for Defendant submitted that after DW1 did the thumb up signal to PW1 and PW1 responded with another thumb up signal, the possession of the vehicle had been passed to PW1 and DW1 was no longer having the care and custody of the vehicle and therefore is not liable for the loss of the vehicle. With respect the Court disagree. Possession of the vehicle must be in physical possession of PW1. Assuming that the Court accepted DW1's version, PW1 cannot be said already in the possession of the vehicle by gesturing with thumb up signal. What is the meaning of thumb up signal? To me the meaning of thumb up signal is good and not possession.

It is obvious therefore, the learned Sessions Court judge's finding as to the possession of the vehicle at the time it was driven away was based on inference of facts adduced in evidence. It is a settled law that the appellate court should not disturb the trial court's finding of fact unless it is completely unsupported by evidence. But an appellate court may draw a different inference on the same facts if such inference seems to be more possible or reasonable in the circumstances. [See *Mohd Samsuddin bin Ismail v. Tan Yeow Hwa & Anor* [2000] 7 MLJ 24, *Dato' Yap Peng v. PP* [1993] 1 MLJ 337. In this regard,

I disagree with the finding of the Session Court judge that the plaintiff did not have possession of the vehicle because there was no physical possession. In law, possession does not necessarily mean physical possession. *Black's Law Dictionary* (7th edn.) defines 'possession' to mean:

> The right under which one may exercise control over something to the exclusion of all others, the continuing exercise of a claim to the exclusive use of material object.

Therefore the most crucial element in possession is the amount of control one has over a material object. If a person has control over a material object to the exclusion others, then it can be reasonably said that the person has possession of the object.

On the evidence of PW1 and DW1, I am of the view that it is more reasonable to infer that possession has passed to the respondent when the vehicle was driven off. The uncontradicted evidence of DW1 was that he drove the vehicle after the tyre was repaired and parked the vehicle 'at the side rear out outside the premise' and after DW1 had parked the vehicle, DW1 alighted from the car and DW1 gestured to the respondent, who was then standing at the side of the vehicle and was talking on his mobile phone, with a thumb up signal. The respondent acknowledged the gesture by also giving DW1 the thumb up sign. As the record of proceedings shows (at p. 34 of the Record of Appeal), when DW1 was cross-examined on this point he was very consistent and did not waver in his testimony. But when PW1 was asked where he was standing when DW1 alighted from the car, PW1 conveniently answered that 'he can't remember' (see p. 24 Record of Appeal). However earlier in his examination in chief PW1 said 'I was inside the office settling the bill so I don't know where the owner parked the car.' (at pp. 19 & 20 Record of Appeal). The inconsistencies and contradictions in the evidence of PW1 on this point becomes more glaring when PW1, in his first police report lodge on 7 June 1994 at about 16.05pm (at p. 73 of Record of Appeal), that is on the same day and barely within 30 minutes after the vehicle was driven away said that the vehicle was 'di letak di belakang kedai Metro Tyre', that is to say the vehicle was at that time parked at the rear of DW1's shop. But in his supplementary police report, which was made two days after the incident (at p. 74 of Record of Appeal) PW1 gave a different version. In this regard I prefer the first police report made on 7 June 1994 to the supplementary because it was more contemporaneous with the happening of the event and was made very soon after it happened. In the circumstances, I am of the view that DW1's version as to the handing over of the vehicle to PW1 was more reasonable and should

be preferred. Therefore in my judgment, when PW1 acknowledged DW1's gesture of 'thumb up' by returning a similar gesture, it can reasonably be inferred that PW1 had acknowledged the return of the vehicle to him after the repair was done. The fact that DW1 did not speak to PW1 to hand over the possession of the car was reasonably explained by DW1 in his evidence when DW1 said that when he alighted from the vehicle PW1 was talking on his mobile phone, so do did not speak to PW1. Under cross-examination by the respondent's counsel on this, DW1 answered:

> I could not talk to him at that time. This is part of my courtesy that when the customer on the phone I should not stand within listening distance.

In the circumstances, I find that on the evidence adduced on this point, possession has already passed to the respondent/plaintiff when the vehicle was driven off.

DW1 also said that when he alighted from the vehicle, he left the ignition key in the vehicle and the key was at 'on' position. Could this act of DW1 amount to negligence. In my judgment it could not. As the evidence shows PW1 was standing besides the vehicle when DW1 alighted from the vehicle and PW1 had acknowledge the thumb up sign by DW1. In my judgment DW1 was not to be blamed for this act. DW1 could reasonably assume that PW1 had acknowledged the return of the vehicle when he acknowledged DW1 thumb up sign, and it is also in my view reasonable for DW1 to leave the ignition at the 'on' position in the vehicle since PW1 was standing next to the vehicle at the material time.

The fact that PW1 was talking on his mobile phone and was not paying much attention to his vehicle could not in the circumstances shift the blame to DW1, after PW1 having acknowledged the thumb up sign by DW1.

I come now to the first ground of appeal which in my view is the most important ground. That is so because this ground of appeal goes to the root of the respondent's case in that it raises the question of the respondent's locus to maintain the claim against the appellant.

The trial Sessions Court judge in his ground of judgment (see p. 41 of Record of Appeal) came to the conclusion, although not in so clear words, that the respondent was the owner of the vehicle and therefore have a right to claim for the loss of the vehicle. The trial Sessions Court judge relied on the decision in *Public Finance Bhd v. Ehwan Saring* [1996] 1 MLJ 331 for this finding. He was wrong. That case does not support such a finding. In fact there is a string of cases which show that under a hire purchase agreement the hirer is

not the legal owner. [See *Arab Malaysian Finance Bhd v. Samian Sabin & Anor* [2003] 2 CLJ 115, *BBMB Kewangan Bhd v. Tan Swee Heng & Anor* [2002] 7 CLJ 377, *Credit Corp (M) Bhd v. The Malaysian Industrial Finance Corp & Anor* [1976] 1 MLJ 83 & *Low Ping Ming v. MBF Finance Bhd* [2002] 2 CLJ 30]. In the case of a motor vehicle the hirer maybe a registered owner but he is, in law, definitely not the legal owner.

The legal owner is the person who owns and has an undisputed legal title to the vehicle. This is what the relevent section of the Hire Purchase Act is giving effect to.

In this case, it is not disputed that the respondent was the hirer under the hire purchase agreement dated 9 February 1993 and at the time the vehicle was stolen it was still under the terms of the hire purchase agreement. Therefore, the respondent cannot claim to be the owner of the vehicle.

On this ground alone I should allow the appeal. On the foregoing reasons also, this court finds for the appellant/defendant on grounds No. 4 and 5 of the grounds of Appeal.

In passing, I would like to note that the respondent/plaintiff's statement of claim (at p. 3 of the Record of Appeal) was very brief. Though the claim was grounded on the negligence of the appellant/defendant, the statement of claim did not particularise the acts or items of negligence by the appellant/defendant. It is necessary that where a claim is grounded on negligence the particulars of negligence be spelt out in the statement of claim.

In his submission, the counsel for respondent/plaintiff submitted, in the alternative, that the appellant/defendant is also liable as bailee or under the contract of bailment. Counsel for the respondent/plaintiff submitted that when the vehicle was sent to the appellant/defendant for repair, the vehicle was under bailment to the appellant/defendant during the period of repair. But this issue of bailment was never pleaded by the respondent/plaintiff. Neither did the respondent/plaintiff plead that the vehicle was still under hire purchase. In any event, I find that the bailment was coming to an end when the respondent took possession of the vehicle after the repair was done. [*Nambiar v. Chin Kim Fong* [1963] 29 MLJ 60.

In the circumstances, I allow the appeal by the appellant with cost. I made no further order as to the alternative prayer by the respondent that the respondent is entitled to claim on the loss of use of the vehicle for the reason that the trial judge had found that there was no evidence to support the claim for loss of use of the vehicle and there was no appeal by the respondent on that finding of the trial judge.